

Supreme Court, U.S.
FILED

JAN 31 1980

MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1979

NO. 79-879

IN THE MATTER OF
RICHARD T. TRACY, SR.,

AGAINST

RODGER A. GOLSTON, JOHN WENTZ, ANTHONY H.
MASON, ROBERT C. BROOMFIELD, STANFORD LERCH,
JAMES CAMERON, JAMES O. WHITE, CHARLES LEE
WHITECRAFT, ROBERT J. DONOHUE, MARGARET P.
HANCE, WILLIAM DONAHUE, JOY W. CARTER,
ROSENDO GUTIERREZ, KENNETH O'DELL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

RICHARD T. TRACY, SR.
2650 West Union Hills Drive
Phoenix, Arizona 85027
Petitioner Pro Se
Attorney for Petitioner

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Respondent's Brief in Opposition follows their heretofore successful pattern. Like all other tribunals, this Court is to dismiss the Petition without examining the merits of prior proceedings. In four years of litigation, Respondents have not been required to call a witness or file an affidavit.

This Court is asked to assume that all proceedings below were regular and issues correctly decided. If this were true, why do Respondents resist review and examination of the

record? Basic rules of law have been avoided and an attitude adopted by the judiciary that once Petitioner's fixed term of office expired, he has no rights as incumbent or citizen to question or object to the methods, procedures employed or motives of public officials who prevented him from succeeding in his office as Phoenix City Court Judge.

No court, state or federal has permitted an opportunity for debate of Respondents' all important issue of tenure. The Arizona Supreme Court's opinion was based on a denial of standing to bring a Quo Warranto Action and cites 1937 case law. Subsequent liberal court interpretations such as *Application of Levine*, 97 Ariz. 88, 397 P.2d 205, and constitutional safeguards and restrictions were ignored as were provisions of A.R.S. 17 Special Actions Rule 4 and 6 (1970) 38-431.03.1 to .07 (1974), which give Petitioner standing to void the prior proceedings. Confident of continued success, Respondents avoided replying to those issues.

There is no viable case pending in Federal District Court in view of the holdings of *Monroe v. Pape*, 365 U.S. 167; *United States v. Wickersham*, 201 U.S. 390; *Silver v. New York Stock Exchange*, 373 U.S. 341, and *Regents v. Roth*, 408 U.S. 564.

THE U.S. COURT OF APPEALS FOR THE 9TH
CIRCUIT DID NOT APPLY THE USUAL
STANDARD OF REVIEW

In adopting the Arizona Supreme Court's holding in *Tracy v. Dixon*, 119 Ariz. 165, 579 P.2d 1388, the inadequate and futile, dismissed state administrative review which the Senior District Court Judge required the Petitioner to pursue when dismissing federal civil rights claims of the Petitioner, the Court of Appeals said:

"Even absent such a definitive decision, it is *unlikely* that the plaintiff would have been able to show a property interest or entitlement sufficient for stating a constitutional claim." (Emphasis added.)

The action should not have been dismissed or the dismissal affirmed if that or any other material allegations of the complaint were not shown beyond a doubt to be contrary to Petitioner's material allegations, which, on motion to dismiss, are taken as admitted and to be liberally construed in favor of the Petitioner. Those standards are summarized by the 9th Circuit in *Sherman v. Yakabi*, 549 P.2d 1287 (1977), at page 1290. In that case, the failure to follow rules in the discharge process, as in the case at hand, was found to be a violation of the civil rights statute. "Procedure is to law what 'scientific method' is to science." *In re Gault*, 387 U.S. 1.

The U.S. Court of Appeals for the 9th Circuit did not address the first amendment issue as they did in *Haimowitz v. University of Nevada*, 579 F.2d 526 (1978), where it held:

"Despite the fact that appellant had no tenure, he still cannot be removed if his dismissal is predicated on his exercise of first amendment rights, (citations)"

* * *

"Under this procedure, Appellant should have been given the opportunity to show that his conduct was protected and that protected activity was the motivating factor in his nonretention."

This Court shifted that burden to the agency in *Mt. Healthy v. Doyle*, 429 U.S. 274, decided after the cases cited by Respondents in their brief. Petitioner was not afforded that opportunity. He was precluded from discussing merits or acts of officials, by judges who raised from their seats in anger when he attempted to do so.

In their brief, Respondents set forth the questions believed presented in the lower court in a manner that reduced issues presented and relegated the First Amendment claim to a secondary issue.

The Brief on Appeal read as follows:

"Is a judicial office holder who offers constructive criticism of the justice system deserving of a fate reserved by the religious for heretics, the military for traitors, without being afforded due process or equal protection of law?

Has a District Court jurisdiction to require Plaintiff-Appellant to exhaust his state administrative remedies and dismiss with prejudice his federal claims, thus denying a trial or hearing at any level on any claim?

Upon the record, was the District Court required to deny Appellee-Defendants' Motion to Dismiss and grant Appellant's Motion for Partial Summary Judgment in view of the allegation supported by evidence of non-retention in retaliation for exercise of First Amendment rights accompanied by lack of due process and equal protection when the opposing party relied upon argument, not evidence to resist the motion?"

First Amendment rights and absolute dominance over the legal system of this isolated community has always been the underlying issue, not tenure. Why else would such an august body assemble to review a city court Judge's reappointment and why hold a hearing nine days after his term expired if he did not have tenure?

No court has given consideration to the serious loss of liberty when an attorney is secretly and publicly defamed in the presence of or by the Chief Justice of the local Supreme Court and Chief Trial Court Judge. Abuse of power over those in the legal system occurs frequently as demonstrated by the attached Appendix "G". What is rare is that

one would attempt to question their authority. Once the scheme unfolded, no alternative was available. Petitioner had lost reputation, liberty, property and the feeling of security. Even moving to another jurisdiction did not permit escape from the stigma of the removal process.

Respondents' inference that Petitioner was given a due process hearing is not supported by the facts. After the improper secret and public meetings, at which evidence allegedly was received against Petitioner and his successor interviewed, Petitioner made written demand for an open hearing. It was then that the Board ~~intimidated~~ the City Council to ratify their action and replace Petitioner. The newspaper carried his removal and named his successor, as well as vicious false charges released by the Board Chairman. Petitioner learned of that meeting from the evening T.V. news on March 2, 1976. On March 9, 1976, he appeared before City Council and requested a due process open hearing provided for by local law and prior pronouncements of State and Federal Courts. (Appendix "G") He continued to be the lawful incumbent until forced to vacate the office on April 5, 1976.

**RULE 19 IS CALLED FOR TO PRESERVE THE
"IMPERATIVE OF JUDICIAL INTEGRITY."**

At the dawn of true democracy in this nation in *Mapp v. Ohio*, 367 U.S. 643, this Court observed:

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As M. Justice Brandeis, dissenting, said in *Olmstead v. United States*, 277 U.S. 438, 485 (1928): 'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the Government becomes a lawbreaker, it

breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy'."

When the offenders are those who impose on other professions standards which they themselves fail to observe and disregard duly enacted legislation, then that danger is a clear and present one.

Due to lack of respect for the law and wide spread corruption present in Arizona in 1973, the Petitioner had imprinted upon his personal stationery the following which may have served as his epitaph:

"A NATION CAN NOT OUTLIVE JUSTICE,
WHERE LAW ENDS, TYRANNY BEGINS."

CONCLUSION

In the interest of Justice, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD T. TRACY, SR.

Thursday, March 4, 1976

Section B, Pages 1 to 12

DEMANDS TO FACE ACCUSERS

APPENDIX G Page 1

Judge Challenges Advisory Board Act

476 By JOHN E. VESEY

City Court Judge Richard T. Tracy Sr. has charged his constitutional rights were violated when a city advisory board recommended the Phoenix City Council not reappoint him to a four-year term.

Tracy's attorney, Richard E. Fay, will ask the council Tuesday morning to conduct a formal open hearing so the judge can meet his accusers face-to-face.

Fay contends the council's Judicial Selection Advisory Committee heard TRACY damaging testimony during private meetings against the 50-year-old judge and Tracy had no chance to defend himself.

"IF HE DOESN'T get a chance to respond to the charges, I won't consider the matter resolved and we'd have no recourse other than to go to court on it," Fay said.

The Judicial Selection Committee, established by the past City Council last fall, has so far reviewed six of the 13 full-time city judges and has recommended that three of them not be re-appointed.

They are: Tracy, Bruce Bayer and James M. Smith. The terms of Tracy and Bayer expired Feb. 13 and Smith was terminated last Dec. 30.

Tracy is the only one to fight the committee's decisions. Bayer reportedly will get job as an assistant in the attorney general's office and Smith will become an assistant in the city attorney's office.

THOSE GRANTED another four-year term: Lyle R. Allen, Harold L. Kaunz and Eugene K. Mangum. Allen's appointment came this past Tuesday.

The only other city judge whose term expires this year is Robert Danz. It comes May 2.

The city went to the committee approach in selecting judges to avoid political-appointment crannyism.

Before 1971, all city judges were

3-5-76

fully appointed boards and commissions."

B-16 Wed, Mar. 10. □

Rights Violation Denied

Constitutional rights of City Court Judge Richard T. Tracy Sr. were not violated when an advisory board recommended he not be reappointed, City Atty. Joe R. Purcell declared today.

Tracy, through his attorney Richard E. Fay, will address the Phoenix City Council on the subject at the Tuesday morning council meeting.

Fay said he will ask the council to grant Tracy a formal hearing.

JOE PURCELL said the editing in the city manager's court judges.

Although Purcell said hearings on appointments weren't necessary, he conceded that it wasn't really fair to lump the city court judges in with board and commission appointees, since they work free and judges make \$11,517 annually.

TRACY AND his attorney have threatened to sue the city if he isn't granted a hearing, since neither were given an opportunity to hear allegations made against the judge.

These were made during a Feb. 13 public hearing when citizens claimed he was unfair to

judges. ~~judges~~ four-year plans to sue the failure to give an open, public hearing.

TRACY, through his attorney, Richard E. Fay, argues his constitutional rights were violated when the council's Judicial Selection Advisory Committee failed to let Tracy speak in his own defense when certain allegations were made about him.

He was accused of being closed-minded to minorities and poor people, attempting to superimpose himself as prosecuting and defense attorney as well as judge and issuing a directed verdict of guilty in a case without letting it go to a jury.

denied reappointment.

They also told the council if the committee's recommendations weren't upheld — and the council instead made its decision on a political instead of moral basis — the committee's members would resign en masse.

MEMBERS OF THE committee: Robert C. Broomfield, presiding judge of the Superior Court; James Duke Cameron, chief justice of the Arizona Supreme Court; Stanford Larch, treasurer of the State Bar of Arizona; Anthony H. Mason, president of the

Berger says pressure blocked probes

By ALBERT J. BITTER

Maricopa County Attorney Moise Berger blamed pressure from a "power structure coalition" for the failure of his office to investigate and prosecute white-collar crime, when asked by police for an explanation.

A confidential law-enforcement report includes a transcript of a secretly recorded conversation that took place a year ago between Berger and Londo McCracken, a detective with the Phoenix Police Department's intelligence unit.

During that conversation, Berger failed to explain fully why he apparently yielded to the pressures of the "power structure," according to a transcript copy obtained by The Arizona Republic.

City Court Report Held 'Incompetent'

By PRESTON LONG

A report calling for a complete revision of the Phoenix City Court system is being touted as "incompetent and damaging to the court in an unfair way."

The change was made after interviews with several attorneys who had within the court system.

"ON THE VERY first indication that search by any knowledgeable person was put into a lawyer said.

Extensive recommendations for updating the court were made yesterday by Phoenix City Council page report authored by representatives of the Court Management Bureau.

The two-man team recommended the city should hire an outside consultant on a "basis" to assist changes in the system.

On a point-by-point basis, the

In answer to the recommendation to formulate local rules of court, the attorneys

Former JP cleared of fund charge

Marion Ralph Jenkins, former Phoenix justice of the peace, was exonerated Wednesday of a charge that he misused public funds while in office and was reinstated as a justice pro tem.

A charge of misuse of public funds was brought against Jenkins last September when he was running for the Maricopa County Board of Supervisors as an independent.

Jenkins was charged with having

"That is absolutely wrong. As a point of general law, it is the prosecutor's duty to determine whether to proceed or not with a prosecution," one said.

THEY bargaining the pros- fense at only give action.

State Su- down rules sepm- room cl- swearing study cor- tories in rules d by an the high

"In fa- nix tried have be oath and ordered, practice."

State pro- cedur-

Nastro, who appeared before the jury Thursday when it started hearing testimony in the probe, also testified Tues-

Jury refuses to indict in courts probe

By JERRY HICKEY

The county grand jury completed its investigation of three cases of alleged tampering in city courts Tuesday, but it declined to return any indictments.

County Attorney Moise Berger said the jury will continue on Thursday its probe of allegations of misconduct in the city court system.

Reportedly, the three cases already presented to the jury involved two municipal court judges, Daniel Nastro and Herbert Danz.

Nastro, who appeared before the jury Thursday when it started hearing testimony in the probe, also testified Tues-

prising," McCracken commented in the report.

Berger has announced that he will resign later this month to take a teaching job in California.

Confiding to McCracken about what he described as his years of frustration, Berger related:

"You go on. You can't get the cases filed. You can't get the work done. Now cases get thrown out of court and you don't understand why."

"The reason is very simple," Berger continued. "The goddam lid is on the son of a bitch all the way from the very top."

Land fraud, a common white-collar crime in Arizona which had been given little attention by prosecutors until re-

McCracken. The Republican county attorney apparently ignored the fact that his office had the exclusive power to prosecute felony fraud cases before the creation of a statewide grand jury earlier this year.

Among the influential persons who should be investigated, Berger said in the conversation, is Harry Rosenzweig, a Phoenix jeweler, financier and former state Republican chairman.

Berger said Rosenzweig "should be investigated" for his role in Educational Computer Systems. ECS became the holding company for several fraudulent land firms, including the corrupt Great Southwest Land and Cattle Corp., which was controlled by Ned Warren Sr., a convicted con man and extortionist.

In an interview last year, Rosenzweig told a reporter that he was a stockholder and was unaware of Computer's land company. (See story on Page A-8)

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Arizona Republic: A Touch Of Irony 1-10-80

IN CLEARING former state Appeals Court Judge Gary Nelson of any wrongdoing, the State Bar of Arizona has touched on an irony.

Nelson, who was turned out of office in 1978 by voters, was accused by land swindlers Ned Warren Jr. and Howard Woodall of having accepted bribes to clear up gambling debts which, by his own admission, amounted to \$7,000.

This, a Bar report says, "represents ... one of the most bizarre injustices ever foisted upon a member of our profession."

Having found rage for Warren and Woodall for what they did to one of their own, the Bar might properly now find some rage for the system that allowed Warren to hold sway in Arizona for more than a decade, and a system that enabled him to fleece victims in shoddy real estate deals.

Embedded in that system was clever legal advice to establish his corporations, legal advice in writing contracts and legal advice that seemed to keep Warren ahead of the law while he enriched himself.

The irony for the Bar is that had Warren

not been such a clever operator, and therefore unable to become a powerful and wealthy fixture in Arizona, he then would have been in no position to accuse then-Judge Nelson of any wrongdoing.

Our recollection is that, during the days when police officials and investigative reporters for *The Arizona Republic* were publicly deplored Warren's fraud, the state Bar never officially uttered a word to protest the swindling, nor to investigate whether lawyers were involved in Warren's schemes, nor to express anger over the plight of his victims.

If there is a lesson to be learned, it is this: The legal profession cannot remain aloof to corruption infecting a community, then wail when one of its own is touched.

It must join forces with industry, finance and civic groups to to erect barriers to the likes of Warren who have found the going easy for their corrupt and criminal ways.

Otherwise, unchecked and unchallenged entrepreneurs of crime will have other occasions to corrupt, and to sully the career of other members of the legal profession.